

SUPERIOR COURT  
YAVAPAI COUNTY, ARIZONA

2011 APR 14 PM 4:00

JEANNE HICKS, CLERK

BY: Ivy Rios ✓

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9 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
10 **IN AND FOR THE COUNTY OF YAVAPAI**

11 JOHN B. CUNDIFF and BARBARA C.  
12 CUNDIFF, husband and wife; ELIZABETH  
13 NASH, a married woman dealing with her  
14 separate property; KENNETH PAGE and  
15 KATHRYN PAGE, as Trustee of the Kenneth  
16 Page and Catherine Page Trust,

17 Plaintiffs,

18 v.

19 DONALD COX and CATHERINE COX,  
20 husband and wife, ET UX ET AL.,

21 Defendants,

No. P1300CV20030399

Division 1

**RESPONSE AND OBJECTION TO  
REQUEST FOR JUDICIAL  
REASSIGNMENT**

(Assigned to the Hon. David L. Mackey)

22 Defendants, by and through undersigned counsel, do hereby respond and object to the  
23 Request for Judicial Reassignment filed by James L. Varilek in this matter. As set forth in more  
24 detail below, Mr. Varilek is not entitled to a change of judge in this case. Accordingly, the Motion  
25 should be denied. This Response and Objection is supported by the accompanying Memorandum  
26 of Points and Authorities and the Record on File, which on the issue of this Division presiding over  
27 this case itself is rather extensive.  
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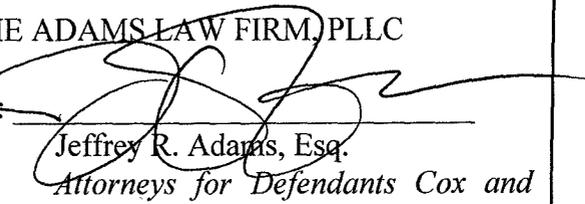
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1 Respectfully submitted this 14 day of April, 2011.

2 THE ADAMS LAW FIRM, PLLC

3 By: 

4 Jeffrey R. Adams, Esq.

5 Attorneys for Defendants Cox and  
6 Joined Defendants

7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 **I. Procedural History Supporting Denial of Request for Reassignment.**

9 The issue of this Division of the Yavapai County Superior Court presiding over this case is  
10 not new. The issue first arose with Plaintiffs' Notice of Change of Judged filed on September 18,  
11 2008. That request was filed by Mr. Varilek's counsel on behalf of Plaintiffs in this case. More  
12 importantly, the Notice was filed after (i) allowing this Court to preside over this case for, at that  
13 time, more than five years, (ii) allowing this Court to render legal and factual rulings on multiple  
14 motions for summary judgment not to mention the contested issues of necessity and indispensibility  
15 of those property owners in the subdivision, including Mr. Varilek, who have since been joined, (iii)  
16 Plaintiffs were threatened with dismissal lest they join the recently joined property owners in the  
17 subdivision and (iv) Plaintiffs' failure to appeal the decision of Division One on the issue of joinder.

18  
19 The issue of this Court continuing to preside over this case did not stop there. Rather,  
20 Plaintiffs filed a Special Action seeking review of this Court's denial of Plaintiffs' Notice. However,  
21 Division One of the Court of Appeals affirmed this Court's decision. Undaunted, Plaintiffs sought  
22 review of the issue by the Arizona Supreme Court. However, as with Division One of the Court of  
23 Appeals, the Supreme Court likewise affirmed this Court's ruling. Based upon the foregoing,  
24 Defendants believe that the issue of this Court's propriety in presiding over this case should be well-  
25 settled and Mr. Varilek lacks the right to have this Court removed from this case.  
26  
27  
28 / / /

1                   **II.     Mr. Varilek Is Not Entitled To A Change Of Judge Under Rule 42(f)(1)(D).**

2                   Whether he likes it or not, in addition to being a plaintiff in his own lawsuit against Robert  
3 Veres in Yavapai County Superior Court Cause No. CV2009-0822, Mr. Varilek is a party to this  
4 case as a joined, indispensable party. Accordingly, while Mr. Varilek may have had a right to a  
5 change of judge in his case with Mr. Veres prior to it being consolidated with this case, he cannot  
6 now come into this case and ignore the procedural and substantive history of this case.  
7

8                   Rule 42(f), Ariz. R. Civ. P., limits the circumstances under which a party may seek removal  
9 of a judge. Pursuant to Rule 42(f)(1)(D), a party may not seek removal of a judge after the following  
10 events occur:

- 11                   (ii)     after notice to the parties  
12                                 (aa)    the judge rules on any contested issue; or ...  
13                                 (cc)    the judge holds a scheduled conference or contested hearing....  
14

15                   See Rule 42(f)(1)(D), Ariz. R. Civ. P.

16                   In ruling on the propriety of a denial of a request for change of judge, *Marsin v. Udall*, 78  
17 Ariz. 309, 279 P.2d 721 (1955) and *Rhodes v. Fisher*, 140 Ariz. 345, 681 P.2d 928 (Ct. App. 1984)  
18 provide controlling authority. In *Marsin*, the Arizona Supreme Court held that where, as in this case,  
19 “a judge is allowed to receive evidence which, of necessity, is to be used and weighed in deciding  
20 ultimate issues, it is too late to disqualify him ....” *Id.* 78 Ariz. at 315, 279 P.2d at 725.  
21

22                   In *Rhodes*, the Arizona Court of Appeals expanded upon the foregoing principal. Therein,  
23 the Court of Appeals held that where a trial court judge has been allowed to consider contested issues  
24 of fact and law and the positions of the parties and thereby gives the parties reason to know how the  
25 court feels about the merits of any aspect of the case, there has been a waiver of the right to a  
26 peremptory challenge of the judge. *Id.* at *Rhodes*, 140 Ariz. at 347-348, 681 P.2d at 930-931.  
27  
28

1 In this case, this Court has heard contested issues of fact and law and been allowed to  
2 consider the most important piece of evidence in this case – namely, the CC&Rs – in ruling on  
3 multiple motions for summary judgment and in considering the joinder of other parties. This Court  
4 also has (i) received and considered evidence that goes to the heart of Defendants’ defenses in this  
5 case and the impact of those defenses on Plaintiffs and Defendants not to mention the third-parties  
6 and joined property owners in the subject subdivision and (ii) received and considered evidence and  
7 issued rulings on contested issues of fact and law when they the parties participated in preparing and  
8 filing the parties’ Joint Pretrial Conference Memorandum on October 15, 2007.

10 In his Request, Mr. Varilek argues that the case of *Huerta v. Nelson*, 222 Ariz. 44, 213 P.3d  
11 193 (Ct.App. 2009), is not dispositive on this issue because of the difference in the timing of the  
12 request made in *Huerta* and Mr. Varilek’s request in this case. Defendants, however, disagree.

14 In *Huerta*, a newer case was consolidated into an older case. After consolidation, one of the  
15 parties filed a Rule 42(f) notice of change of judge. Because one of the parties in the older case had  
16 already filed a notice prior to consolidation, the party from the newer consolidated case making the  
17 request following consolidation was denied the request. In focusing on the language of Rule 42(f)  
18 as it pertains to the designation of parties with each side possessing one preemptory right to a change  
19 of judge, the Court stated:

21 In refusing to honor Petitioner's notice, Judge Nelson found  
22 that in the consolidated cases Petitioner was aligned with the same  
23 “side” he occupied in the probate action and that he already had  
24 exercised that side's one preemptory change. Petitioner argues that  
25 because Rule 42(f)(1) states each side is entitled to a change of judge  
26 as a matter of right “[i]n any action pending in superior court”  
27 (emphasis added), and because “consolidation of cases ... does not  
28 merge the suits into a single cause, or change the rights of the  
parties,” *Yavapai County v. Superior Court*, 13 Ariz.App. 368, 370,  
476 P.2d 889, 891 (1970) (citation omitted), he was entitled to a  
change of judge as a matter of right in the consolidated action despite  
already having exercised that right in the probate matter.

1 The plain language of the rule, which expressly applies to  
2 consolidated cases, disposes of Petitioner's argument. Although the  
3 rule grants a peremptory change to "each side" "[i]n any action," it  
4 expressly limits that right by providing that "[e]ach action, whether  
5 single or consolidated, shall be treated as having only two sides."  
6 Ariz. R. Civ. P. 42(f)(1)(A) (emphasis added); see also *Brush*  
7 *Wellman*, 196 Ariz., at 348, ¶ 13, 996 P.2d at 1252 (Rule 42(f)(1)  
8 allows "one change of judge per side, rather than per case"). Thus,  
9 pursuant to the rule, if a party in Case One exercises its right to a  
10 change of judge before that case is consolidated with Case Two, that  
11 peremptory change prevents a party on the same "side" in Case Two  
12 from exercising an "of right" change of judge after consolidation.

13 *Huerta* at 222 Ariz. at 45-46, 213 P.3d at 194-95. Put simply, in the case of consolidation, the  
14 parties to the newer case are bound by the conduct of the parties involved in the older case. Thus,  
15 following the logic and reasoning set forth in *Huerta*, Mr. Varilek is bound by Plaintiffs' conduct  
16 in allowing this Court to preside over this case for the past eight years and the request for a change  
17 of judge at this juncture is too late because it was long ago waived pursuant to Rule 42(f)(1)(D),  
18 Ariz. R. Civ. P.

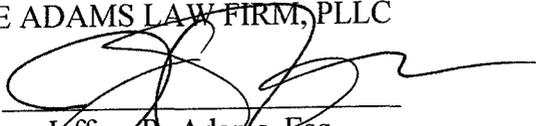
19 Because this Court has been allowed to receive, consider, evaluate and analyze facts and  
20 evidence to be used, weighed and considered in deciding the ultimate issues in this case including  
21 the enforceability and abandonment of the CC&Rs, the request for a change of judge by Mr. Varilek  
22 should be denied. Plaintiffs, acting on behalf of Mr. Varilek, waived his right to a change of judge.  
23 Accordingly, this Court should deny Mr. Varilek's Request.

### 24 **III. Conclusion.**

25 For the foregoing reasons, Defendants respectfully request that the Court enter an order  
26 denying Mr. Varilek's request for reassignment. Further, inasmuch as the issue of a change of judge  
27 has been exhaustively litigated previously, by the same counsel, Mr. Wilhelmsen, who had the  
28 benefit of knowing full well that the issue had been resolved long ago, Defendants request an award  
of their attorneys' fees, costs and expenses incurred in having to respond to Mr. Varilek's request.

1 Respectfully submitted this 14 day of April, 2011.

2 THE ADAMS LAW FIRM, PLLC

3 By: 

4 Jeffrey R. Adams, Esq.

5 *Attorneys for Defendants Cox and identified  
Joined Defendants*

6 A copy of the foregoing was  
7 hand-delivered this 14 day of  
8 April, 2011, to:

9 The Honorable David L. Mackey  
10 Yavapai County Superior Court  
11 Division 1  
12 Yavapai County Courthouse  
13 Prescott, Arizona

14 And a copy mailed First Class Mail  
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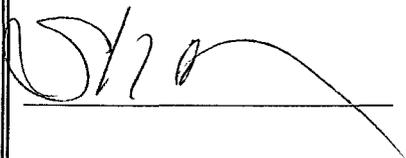
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